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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE W. O'RAFFERTY,

Defendant and Appellant.

G040890

(Super. Ct. No. RIF113535)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Erik Michael Kaiser, Judge. Affirmed.

Peter F. Murray for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, David Delgado-Rucci and Raymond M. DiGuseppe, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant George W. O’Rafferty and several of his associates, while serving as administrators at Riverside Community College District (RCC), enriched private entities they owned and operated through contracts they negotiated and implemented with another community college. Ultimately, a jury convicted defendant of three counts of unlawful conflict of interest by a public officer or employee (Gov. Code, § 1090); two counts of misappropriation of public moneys by a public officer or employee (Pen. Code § 424, subd. (a)(1));¹ one count of attempting to misappropriate public moneys by a public officer or employee (§§ 664, 424, subd. (a)); two counts of grand theft (§ 487, subd. (a)); one count of attempted grand theft (§§ 664, 487, subd. (a)); and one count of conspiracy to commit grand theft and misappropriation of funds (§ 182, subd. (a)(1)). The court suspended imposition of sentence and placed defendant on five years formal probation, subject to the condition, inter alia, that he serve 365 days in county jail.

Defendant appeals the judgment and seeks relief on three grounds. First, he claims jury misconduct occurred during deliberations. Second, he asserts the trial court improperly instructed the jury as to the section 424 (misappropriation of public funds) and section 487 (grand theft) counts. Third, defendant avows there was insufficient evidence to sustain his convictions on any of the 10 counts. We affirm the judgment.

FACTS

Background

RCC serves over 30,000 students on three campuses in Riverside County. At all times relevant to this case, RCC received taxpayer funding from the State of California based on its number of full-time-equivalent students (FTES). Because many

¹ All further statutory references are to the Penal Code, unless otherwise specified.

community college students do not attend full time, this funding mechanism measures the number of educational units in which students are enrolled rather than the number of students enrolled. For instance, RCC's current enrollment of more than 30,000 students translates to about 24,000 FTES.

The state allocated FTES funding to each community college district using a base enrollment level (calculated using past FTES data) plus an annual growth authorization. The amount authorized in advance by the state set, in all likelihood, a cap on annual FTES funding. Unless unused money was available for redistribution at the end of the year, institutions enrolling more than their funded amount of FTES would not receive state funding for the extra units of education provided. At the same time, chronically "under-enrolled" institutions faced budget cuts, as the base enrollment level would drop. At approximately \$3,100 to \$3,300 per FTES in state funding, it was extremely important for community colleges under the FTES system to match actual enrollment to authorized FTES funding, i.e., to neither enroll too many nor too few students. Consequently, although RCC sometimes opted to "grow above [its] funded level" to the extent it could still operate, RCC frequently turned away students wishing to enroll because of a lack of funding.

Defendant's tenure at RCC included stints as an instructor (1987 to 1993), then as the dean of occupational education (1993 to 2000), and finally as the associate vice-president for occupational education (from 2000 to August 2002). Occupational education includes areas of instruction geared primarily to preparing students for immediate entry into the work force, rather than academic preparation for transferring to a baccalaureate institution. Examples of occupational education subject areas include auto technology, business, nursing, welding, and law enforcement programs. Defendant had primary responsibility for occupational education programs at RCC, answering to the vice-president of academic affairs (who in turn worked under the president of academic affairs, who in turn reported to the board of trustees).

Of particular relevance to this case is the law enforcement occupational program. RCC law enforcement programs were conducted at the Ben Clark Training Center in Riverside, a building occupied by the Riverside County Sheriff's Department. RCC contracted with the sheriff's department, paying rent for the use of space to teach classes. Steven Bailey, the dean of public safety education and training until 2002, worked under defendant and headed RCC's programs at the Ben Clark Training Center. Until 2002, Robert Curtin, the associate dean of public safety, conducted day-to-day activities at the Ben Clark Training Center and reported to Bailey.

Contractual Arrangement with Palo Verde College

Because of high demand for law enforcement training at the Ben Clark Training Center and the limits of state FTES funding, RCC could not accommodate all individuals who wished to enroll in its law enforcement training programs in the late 1990's. At the same time, Palo Verde Community College (PVCC), near the Arizona border in Blythe, California, was suffering from chronic under-enrollment, unable to meet its FTES growth targets. In March, 1998, RCC and PVCC entered into a contract to address both of these problems. Students wishing to obtain law enforcement education at the Ben Clark Training Center but unable to enroll at RCC would be enrolled with PVCC, then take courses offered by RCC at the Ben Clark Training Center. PVCC would receive FTES funding for the courses taken by these students, and would share these funds (pursuant to the contract) with RCC. RCC could then use the funds it received from PVCC to help pay for space at the Ben Clark Training Center and to otherwise offset its costs of providing law enforcement occupational courses. Defendant (with the assistance of Bailey and Curtin) implemented this contract.

In July 1999, a similar contract was negotiated and executed by RCC and PVCC with regard to California Highway Patrol (CHP) training offerings at the Ben Clark Training Center. This contract allowed PVCC to offer its own courses with some

financial compensation provided to RCC. The CHP contract explicitly recognized, though, that RCC would be the primary vendor for educational services at Ben Clark Training Center, and inserted a right of first refusal as to any courses taught there. Thus, PVCC could not simply begin offering its own courses without the permission of RCC. Defendant (with the assistance of Bailey and Curtin) implemented this contract as well.

Defendant was involved in the negotiation of these contracts, but was not authorized to enter into contracts on behalf of RCC. Defendant, Bailey, and Al Stremble (a PVCC administrator) worked to obtain approval of the contracts, which were based on samples prepared by Stremble. These contracts were approved and were considered to be entirely legal and legitimate by RCC and PVCC officials.

RCC Enrollment of CHP Sacramento Cadets

CHP operates its cadet academy in Sacramento. In contrast to CHP's relationship with RCC in Riverside County, CHP had been unable to reach an agreement with the local community college district in Sacramento to accredit training at the academy. Sometime in late 2000, CHP officials met with RCC officials, including defendant, to discuss the possibility of RCC accrediting CHP academy training.

RCC and CHP entered an agreement in 2001 to accredit course work at the academy, along with any "work experience" classes. RCC agreed to provide CHP \$1,000 per academy enrollee, up to \$1.2 million per fiscal year (amounting to 1,200 cadets), which RCC expected to draw from projected FTES funds. CHP intended to apply the money toward materials for its cadets. PVCC was not a party to this agreement.

Shared Enrollments at CHP Sacramento

Defendant subsequently negotiated with Stremble to share CHP Sacramento enrollments with PVCC. Defendant represented to Stremble that there were excessive CHP Sacramento enrollments at RCC. Defendant and Stremble orally agreed PVCC

would collect FTES funds from the state and pay for each enrollment. Stremble believed this arrangement was legitimate under the RCC-PVCC agreement to share enrollment at the Ben Clark Training Center.

In the spring of 2001, at RCC's expense, defendant, Bailey, and Curtin began traveling to Sacramento to register academy students. They requested prospective students fill out two applications — one for RCC and one for PVCC. Some of the students were then enrolled at RCC and others at PVCC. When CHP officials inquired into the reasons for PVCC's involvement in enrolling students, they were told by Curtin that PVCC was a "sister college" of RCC and that PVCC and RCC had an agreement to share the enrollments. Defendant did not inform RCC administration he was sharing CHP Sacramento enrollments with PVCC.

On May 31, 2001, defendant, Bailey, and Curtin formed a general partnership called Integrated Learning Services (ILS) and registered ILS to use a fictitious business name. ILS employed Curtin's wife and defendant's son. Defendant requested the first payment from PVCC for the CHP Sacramento academy enrollments to be sent directly to ILS. PVCC's chief financial officer approved this payment after meeting with defendant; defendant did not disclose to Stremble or the PVCC chief financial officer that he, Bailey, and Curtin had financial interests in ILS. Defendant represented to Stremble and the PVCC chief financial officer that RCC had a contract with ILS allowing it to process paperwork for RCC related to the CHP Sacramento students. Both Stremble and the PVCC chief financial officer believed the funds transmitted to ILS would ultimately be paid to RCC for its share of the FTES funds. Defendant did not inform RCC administration or CHP that he was going to receive private financial remuneration (through ILS) for the students shared with PVCC.²

² Defendant did notify RCC administrators that he had an unspecified financial interest in ILS in connection with a separate contract entered between ILS and RCC in 2001 that is unrelated to the charges at issue in this case. Furthermore, on

On September 14, 2001, ILS invoiced PVCC for the enrollment of 76 students at the CHP Sacramento academy. Following approval of PVCC administration, the county treasurer issued a check to ILS for \$371,792, which was cashed by ILS on November 19, 2001. Under the same procedures, a check was issued to ILS for \$24,460 for an additional five enrollments. ILS cashed the check on April 16, 2002.

Work Experience Enrollments

Concurrently with their agreement to share enrollments at the CHP academy, defendant and Stremble also negotiated a verbal agreement to share work experience enrollments from courses based at both the CHP academy in Sacramento and the Ben Clark Training Center in Riverside. Negotiations occurred at conferences held for community college administrators and in the business offices of Stremble (at PVCC) and defendant (at RCC). PVCC would accredit work experience classes, and share with RCC a portion of the FTES funds. Defendant indicated RCC would permit PVCC to accredit courses at the Ben Clark Training Center and at the CHP academy.

Based on this arrangement, defendant, Bailey, and Curtin enrolled students with PVCC for work experience credits. As with the agreement pertaining to CHP academy enrollments, Stremble believed ILS was authorized to process the payments and RCC would ultimately receive the funds. ILS invoiced PVCC and was paid from the county treasury \$99,504 for 691 enrollments in early 2001; \$186,136 for 1,119 enrollments in mid-2001; and \$124,272 for 863 enrollments in late 2002. ILS further invoiced PVCC in the amount of \$118,168 and \$76,608 in 2002, but these invoices were not paid.

February 22, 2002, defendant filed a statement of economic interest, which disclosed the fact that he was a general partner in ILS, described ILS as a consulting business, and indicated he received in excess of \$100,000 from ILS.

A variety of testimony supports the conclusion that the work experience program was illegitimate, in that it did not seek to provide actual educational programs but instead served as a “paper mill.” Student paperwork was filled out with identical learning objectives, attendance records, grades, evaluations, and hours of employment. Instructors listed on forms (including defendant) were located too far from the students and were charged with too many students to provide any supervision or to interact with the students as required by legitimate work experience programs. Designated “employer representatives” testified they did not supervise the alleged work supervision classes, did not know the students they supposedly supervised, and did not authorize anyone to place their names on the forms. Enrolled students testified they had not known or met with anyone regarding their goals, progress, or evaluation. False information about the students’ work experiences abounded in the paperwork. Defendant, Bailey, and Curtin created this false and misleading paperwork.

Online Distance Education Enrollments

In the summer of 2002, defendant, Bailey, and Curtin discussed with CHP officials the idea of enrolling past academy graduates in order to provide them with college credit for work they had already completed. The trio indicated they could operate the program online, and RCC could provide accreditation to the CHP officers who chose to participate by taking an online test demonstrating knowledge they had already obtained by way of their prior completion of the CHP academy. In an email defendant sent to Bailey and Curtin, he wrote that the online program was going to be “our big ticket [item] the next year, and I need it bad. Logs for cabins don’t come cheap, you know.”

After his efforts to initiate the program, defendant asked Stremble whether PVCC would accredit the online program. Stremble agreed to accredit the class as a one-time only, credit-by-examination experimental course. Defendant and Stremble agreed: PVCC would pay (ILS) a share of expected FTES funding obtained from the enrolled

students. In fact, such “credit-by-examination” courses are not eligible for state FTES funding because no instruction occurs. PVCC never actually registered any students for this course, because it had not yet been approved for accreditation. The initiation of an investigation into defendant’s and his colleagues’ activities ended the online program.

The Grand Jury Indictment

Following a criminal investigation, defendant, Bailey, and Curtin were indicted on 10 counts. Counts one through three were based on the sharing of CHP academy enrollments with PVCC in exchange for payments to ILS. Counts four through six were based on the provision of work experience enrollments to PVCC in exchange for payments to ILS (or another entity known as RTC). Counts seven through nine were based on the agreement to accredit past CHP academy graduates through online distance learning programs, in exchange for anticipated payments to ILS (or RTC). Count ten referred to an alleged conspiracy between defendant, Bailey, and Curtin to perpetrate the three separate schemes alleged in the prior counts. Bailey and Curtin pleaded guilty; defendant opted to exercise his right to a jury trial.

Curtin testified at trial that he, defendant, and Bailey formed ILS to obtain a financial benefit from the FTES funds PVCC collected through the enrollments ILS processed for PVCC. Defendant acknowledged in his testimony that the primary purpose of ILS was to profit through brokering FTES. Defendant, Curtin, and Bailey all shared equally in the ILS profits, which amounted to hundreds of thousands of dollars apiece. At some time after initiating their private business enterprise, defendant, Curtin, and Bailey agreed they would not talk to other parties about their connections to the private companies, ILS and RTC.

DISCUSSION

Juror Misconduct

Defendant contends a juror declaration — submitted to the court in support of a section 1181 motion for a new trial — demonstrates prejudicial juror misconduct entitling him to a new trial. First, defendant claims the jury received “evidence out of court.” (§ 1181, subd. (2).) With regard to this alleged area of misconduct, the juror declaration states: “During the course of the deliberation period, certain comments were made by one of the jurors. This juror, juror #8, made these comments in the presence of almost all of the other jurors while we were waiting for one or more jurors to return from a restroom break. This juror stated that, based on his experience and knowledge, there was a very specific percentage of all peace officers who attend the academy that turn out to be ‘bad’. To my knowledge, these comments were made from this juror spontaneously without any prior prompting. These comments were of some length lasting several minutes and in these comments the juror spoke with specific personal knowledge and information backing-up his statements. He specifically recited certain percentages for all ‘cops’ who completed the academy that turned out to be ‘bad’. This juror appeared to be speaking from personal experience. The comments were addressed to the fact that Mr. O’Rafferty, the defendant in this matter, was a former law-enforcement officer.”

Defendant also asserts the jury did not follow the court’s instructions on the law, thus preventing a “fair and due consideration of the case” (§ 1181, subd. 3.) To this point, the juror declaration states: “Also of concern was that not one time during the entire deliberative process did we, as a jury, ever discuss the difference between general and specific criminal intent. In fact, we never specifically discussed ‘intent’ at all in the context of discussions about the various crimes. Rather, with respect to each charge that was discussed in order, we always discussed whether it was done ‘willingly and knowingly’ and, if so, then the crime was proven with respect to the required mental

state of Mr. O’Rafferty. The discussion was always that if Mr. O’Rafferty had the mental state as in one who incurs a parking ticket, then the crime was proven. This analysis was applied to each crime of which we subsequently found Mr. O’Rafferty guilty. We never discussed, and I never came to understand, that any other mental state or intent needed to be proven.”

A new trial motion based on jury misconduct should be evaluated under a “three-step inquiry. [Citation.] First, [the court] must first determine whether the affidavits supporting the motion are admissible. [Citation.] If the evidence is admissible, the [] court must determine whether the facts establish misconduct. [Citation.] Lastly, assuming misconduct, the . . . court must determine whether the misconduct was prejudicial.’ . . . [A] trial court has broad discretion in ruling on each of these issues, and its rulings will not be disturbed absent a clear abuse of discretion.” (*Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 160.) The court below found both paragraphs in the juror declaration to be inadmissible pursuant to Evidence Code section 1150, and further found no misconduct occurred even if the declaration was admissible.

Evidence Code section 1150, subdivision (a), provides: “Upon an inquiry as to the validity of the verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.” This rule “protects the stability of verdicts,” as it “prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors’ mental processes or reasons for assent or dissent.” (*People v. Hutchinson* (1969) 71 Cal.2d 342, 350.)

The portions of the juror’s declaration describing the jury’s (allegedly faulty) deliberative process as to the intent elements of the charged crimes are clearly

inadmissible. Although “jurors may testify to ‘overt acts’ — that is, such statements, conduct, conditions, or events as are ‘open to sight, hearing, and the other senses and thus subject to corroboration’ — [they] may not testify to ‘the subjective reasoning processes of the individual juror . . .’” [Citations.] Likewise, evidence about a jury’s ‘subjective *collective* mental process purporting to show *how* the verdict was reached’ is inadmissible to impeach a jury verdict. [Citation.] Thus, juror declarations are inadmissible where, as here, they ‘at most suggest “deliberative error” in the jury’s collective mental process — confusion, misunderstanding, and misinterpretation of the law.’” (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1683 [finding inadmissible jury declarations describing collective misunderstanding of jury instruction during deliberations]; see also *People v. Sanchez* (1998) 62 Cal.App.4th 460, 476 [affidavits describing ““confusion, misunderstanding, and misinterpretation of the law”” during deliberations are inadmissible].) This is not a case in which the proffered evidence indicates the jury agreed to intentionally ignore or subvert the instructions during deliberations. (*People v. Perez* (1992) 4 Cal.App.4th 893, 907-908 [juror declarations are admissible to establish jury’s contravention of court instruction not to consider or discuss defendant’s failure to testify on own behalf].) Section 1150 precludes the introduction of evidence purporting to show the jury committed unintentional error in the application of jury instructions detailing the elements of the criminal offenses at issue.

Evidence of the statement allegedly made by juror number eight is arguably admissible under Evidence Code section 1150. “Among the overt acts that are admissible and to which jurors are competent to testify are statements. Section 1150, subdivision (a), expressly allows proof of “statements made . . . either within or without the jury room”” (*People v. Perez, supra*, 4 Cal.App.4th at p. 907.) According to the declaration, juror number eight verbally introduced extrinsic statistical information relating to the likelihood a police officer who attended “the academy [would] turn out to be ‘bad.’” As described in the declaration, the juror-number-eight statement appears to

consist of an observation relating to the statistical propensity of police officers to commit crimes. To the extent the declaration attempts to contextualize this statement as part of the deliberations (“The comments were addressed to the fact that Mr. O’Rafferty, the defendant in this matter, was a former law-enforcement officer”), the declaration is inadmissible.

Assuming the statement by juror number eight was admissible, the next issue for determination is whether the statement constitutes misconduct. “A juror who ‘consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors’ commits misconduct.” (*People v. Tafoya* (2007) 42 Cal.4th 147, 192.) For example, it is misconduct for jurors to introduce “extraneous law” based on knowledge from their career or past experience rather than the jury instructions provided by the court. (*In re Stankewitz* (1985) 40 Cal.3d 391, 397-400 [juror inaccurately described elements of robbery based on his experience as police officer rather than by referring to jury instructions].) It is also “well settled that evidence obtained by jurors from sources other than the court is misconduct and constitutes grounds for a new trial if the defendant has been prejudiced thereby.” (*People v. Von Villas* (1992) 10 Cal.App.4th 201, 253.) “‘Jurors’ views of the evidence . . . are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror’s own claim to expertise or specialized knowledge of a matter at issue is misconduct.’” (*In re Lucas* (2004) 33 Cal.4th 682, 696, italics omitted.)

The particular statement allegedly made by juror number eight is difficult to classify. It is obviously not an extraneous statement of law. Neither is it “evidence” pertaining to the issues the jury was instructed to determine; the purported study is fundamentally irrelevant to whether defendant committed the crimes alleged. It is a claim to specialized knowledge, but not “specialized knowledge of a matter at issue.”

Had juror number eight simply commented to the effect that there are always a few “bad apples,” or that “of course” some individuals with law enforcement experience commit crimes, such a statement would not raise any questions of misconduct. Does the fact juror number eight purportedly referred to an empirical study as to the percentage of police academy graduates who have committed crimes transform a common sense observation to misconduct? We think not, although we recognize the potential danger of jurors introducing supposed statistical data into the deliberations. Here, even assuming the juror declaration accurately represents what occurred in the jury room, juror number eight did not “offer[] the jurors any basis for deciding the case other than the evidence and testimony presented at trial. [The] declaration [does not] suggest[] [the utterance of] any assertion inconsistent with the properly admitted evidence and testimony.” (*People v. San Nicolas* (2004) 34 Cal.4th 614, 650.) Based on the record before us, juror number eight’s statement appears to have been an attempt to articulate to the jury that defendant’s status as an ex-policeman should not affect the jury’s weighing of the evidence. The court did not abuse its discretion in finding this statement did not amount to misconduct.

Section 424 Jury Instruction

Defendant also claims the court improperly instructed the jury as to his alleged misappropriation of public funds pursuant to section 424, subdivision (a)(1). Section 424, subdivision (a) provides: “Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of *public moneys*, who . . . : [¶] 1. Without authority of law, *appropriates the same*, or any portion thereof, to his or her own use, or to the use of another . . . [i]s punishable by imprisonment” (Italics added.) “The phrase ‘public moneys,’ as used in Section[] 424 . . . , includes all bonds and evidence of indebtedness, and all moneys belonging to the state, or any city, county, town, district, or public agency therein, and all moneys, bonds, and evidences of indebtedness received or

held by state, county, district, city, town, or public agency officers in their official capacity.” (§ 426.)

The jury instruction utilized by the court did not include reference to “the same” public moneys: “Any public officer or employee, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who appropriates public money to his or her own use or to the use of another, without authority of law is guilty of a violation of Penal Code § 424. [¶] In order to prove such crime, each of the following elements must be proved: (1) that the defendant was an officer of the state, or of any county, city, town or district of the state, or was charged with the receipt, safekeeping, transfer, or disbursement of public moneys; and, (2) that the defendant knowingly appropriated public moneys, or any portion thereof, to his own use, or the use of another, without authority of law. [¶] Actual possession of public funds by a public official is unnecessary. It is required only that the defendant has some degree of control over public funds, and that control need not be the primary function of the defendant in his job.”

Defendant argues the omission of the phrase “the same” from the jury instruction misstates the law and this misstatement led to improper convictions on three counts. Defendant explains that his conduct related to receipt of public funds distributed from the state to PVCC and controlled by it. He asserts his conduct cannot satisfy the crime described under the statute because his control over public funds related only to RCC funds. In other words, defendant posits public officials may only be convicted of section 424, subdivision (a)(1), offenses when they misappropriate “the same” public funds with which they were specifically entrusted (and not public funds generally). This argument was raised and rejected at trial.

In support of his position, defendant offers a hypothetical case in which an official with no connection to parking law enforcement (such as a judge) is charged with a violation of section 424, subdivision (a)(1), for stealing change out of a parking meter.

Defendant reasons such a charge would be an absurdity because the statute is actually designed to punish “embezzlement” of funds already within the control of the individual charged. Defendant offers no case authority for this specific proposition, relying instead on the language of the statute and the common law rule of “lenity” — i.e., criminal statutes should be strictly construed in favor of defendants. (But see § 4 [“The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.”]; *In re Christian S.* (1994) 7 Cal.4th 768, 780 [*ambiguous* criminal statutes should ordinarily be interpreted in favor of defendants].)

People v. Groat (1993) 19 Cal.App.4th 1228 (*Groat*) is instructive. *Groat*, a city employee, falsely certified her attendance at work and was thereby paid for a number of days on which she did not actually work. (*Id.* at pp. 1230-1231.) *Groat* was convicted under former section 424 (which, for the purposes of this case, was substantively identical to the current section 424). She claimed on appeal she was not subject to section 424 because she was not ““charged with the receipt, safekeeping, transfer, or disbursement of public moneys.”” (*Groat*, at pp. 1231-1232.) The court disagreed, explaining that “section 424 requires only that the defendant have some degree of control over public funds and that control need not be the primary function of defendant in his or her job.” (*Id.* at p. 1232.) The court further noted, “Appellant is clearly a person charged with disbursement of public money in her ability to authorize her own pay.” (*Id.* at p. 1233.) “When appellant filled out her time card, she took the first step in the process which led to the disbursement of public funds in the form of her paycheck.” (*Id.* at p. 1235.) Thus, section 424 does not require control over specific funds prior to the act initiating the misappropriation.

Webb v. Superior Court (1988) 202 Cal.App.3d 872 (*Webb*) provides us with further guidance. In *Webb*, the petitioner Webb³ had been charged with eight counts of misappropriation of public funds in violation of former section 424, subdivision 1. (*Webb*, at p. 875.) Webb was a county supervisor, who wished to improve a county road in an area adjoining a city within the county. (*Id.* at pp. 876-877.) It was alleged, in part, that Webb: Negotiated with city residents living on the road to build curbs and gutters along the road in exchange for title to the curbside portion of their properties; took possession of checks from the city after consulting with the city council, ostensibly to pay the residents for ownership of the curbside properties and to complete the project; had the residents endorse the checks; and transferred the checks to a contractor charged with constructing the curbs and gutters. (*Id.* at pp. 876-877.) Webb, unbeknownst to the city or the city residents, allegedly extracted sufficient funds from the city to pay for all of the road improvements, including those portions of the road not abutting city residents' properties. (*Id.* at p. 877.) Thus, the relevant allegation for purposes of our analysis was that Webb misappropriated city funds for county expenditures.

The *Webb* court conceded Webb had not engaged in a "typical" violation of section 424, in which a public employee embezzles public funds for his or her own use. (*Webb, supra*, 202 Cal.App.3d at p. 886.) However, the court concluded, "What petitioner did that provides the basis for the charges . . . was use his position as a member of the Board and the trust and respect that position carries with it to implement a scheme . . . that he would not have been able to accomplish through the ordinary and, indeed, legal channels." (*Id.* at p. 886.) The court further rejected Webb's contention he could not be held liable for misappropriating city funds because he worked for the county: "petitioner received the City warrants in his capacity as a county supervisor, he

³ Webb sought a writ of prohibition to prevent the superior court from conducting further criminal proceedings against him. (*Webb, supra*, 202 Cal.App.3d at p. 875.)

delivered the warrants to the various property owners pursuant to arrangements with City officials, and the property owners endorsed the warrants and returned them to petitioner in his capacity as a county supervisor pursuant to arrangements he made with them in that capacity.” (*Id.* at pp. 887-888.)

Writing separately in *Webb*, Justice Ardaiz commented: “The majority opinion concludes that any time a public official gains control of any public funds based on a misrepresentation as to the proposed purpose of those funds, he can be charged with violating section 424, subdivision 1. The weakness in this position is that it fails to consider the statutory requirement that the public official or ‘other person’ be ‘charged with’ responsibility for those funds.” (*Webb, supra*, 202 Cal.App.3d at p. 892 (conc. & dis. opn. of Ardaiz, J.).) Quoting *People v. Wall* (1980) 114 Cal.App.3d 15,⁴ Justice Ardaiz observed former section 424, subdivision 1, was “‘intended to punish those charged with the receipt and transfer of moneys belonging to the state or a subdivision thereof and who misappropriate such moneys *when there is a nexus between the moneys they are charged with and the moneys misappropriated.*’” (*Webb*, at pp. 892-893 (conc. & dis. opn. of Ardaiz, J.).)

We find merit in defendant’s (and Justice Ardaiz’s) suggestion that section 424, subdivision (a)(1), does not reach every possible fact pattern in which a public official illegitimately takes public funds. We do not necessarily endorse the jury instruction used in this case for every case in which a violation of section 424, subdivision (a)(1), is alleged. However, under the facts of this particular case, the jury instruction was appropriate. Defendant, a community college administrator, set in motion a scheme to transfer state funds (designed to pay colleges for the education of students)

⁴ In *People v. Wall*, the defendant was a parking meter collector who misappropriated money from meters; his conviction was affirmed notwithstanding his argument that he was not acting in his official capacity at the time he stole the money (the theft occurred after his shift ended). (*People v. Wall, supra*, 114 Cal.App.3d at pp. 20-22.)

into his private business entities. Defendant utilized his official position to access the public moneys. The fact that the public moneys were not routed through his institution or that he was not specifically entrusted with the particular public moneys he obtained for his private enrichment simply does not matter under the applicable case law. There is a nexus between the public moneys in defendant's control, and the public moneys misappropriated by defendant. Defendant did not steal change from a parking meter; he gamed the state community college funding system for his private gain while acting as a public employee with control over the distribution of those same public funds. Thus, the only public funds at issue in this case were public funds over which the defendant had the requisite control.

Section 487 Jury Instruction

Defendant was convicted of two counts of grand theft and one count of attempted grand theft pursuant to section 487, subdivision (a).⁵ As requested by the prosecution, the court instructed the jury under two theories of theft — theft by false pretenses (Judicial Council of Cal. Crim. Jury Instns. (2006-2007), CALCRIM No. 1804) and theft by embezzlement (CALCRIM No. 1806). Both theories are based on the elements of theft as provided in section 484.⁶

⁵ “Grand theft is theft committed in any of the following cases: [¶] (a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars (\$400).” (§ 487.)

⁶ “Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.” (§ 484, subd. (a).)

Defendant does not challenge the Judicial Council forms utilized in this case. Nor does defendant deny that a jury does not have to “agree on the same theory” of theft in order to return a guilty verdict. (CALCRIM No. 1861; see *People v. Counts* (1995) 31 Cal.App.4th 785, 793 [“In California, the ancient common law distinctions between” various theories of theft “no longer exist by statute; under section 484, there is simply one consolidated crime of theft, which the jury may find . . . if there is an ‘unlawful [taking]’ (§ 952)”]; *People v. McLemore* (1994) 27 Cal.App.4th 601, 605-606.) Instead, defendant claims it was improper to instruct the jury on these two particular theories of grand theft (false pretenses and embezzlement) because the theory presented to the grand jury was one of theft by larceny, which has a separate judicial council jury instruction, CALCRIM No. 1800.⁷ Defendant contends this change in the prosecution’s

⁷ The theft by larceny jury instruction actually provided to the grand jury stated: “Section 487: Theft by larceny. Every person who steals, takes, carries, leaves, or drives away the personal property of another, with the specific intent to deprive the owner permanently of his property, is guilty of a crime of theft by larceny. [¶] In order to prove this crime, each of the following elements must be proved. [¶] A person took personal property of some value belonging to another; [¶] Two, when the person took the property he had the specific intent to deprive the alleged victim permanently of the property; and [¶] Three, the person carried the property away by obtaining physical possession and control for some period of time and by some movement of the property.”

The theft by false pretense instruction provided to the jury stated: “The defendant is charged in Counts 3, 6, 9 with Grand Theft by false pretense. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant knowingly and intentionally deceived a property owner or the owner’s agent by false or fraudulent representation or pretense; [¶] 2. The defendant did so intending to persuade the owner or the owner’s agent to let the defendant take possession and ownership of the property; [¶] 3. The owner or the owner’s agent let the defendant have possession and ownership of the property because the owner or the owner’s agent relied on the representation or pretense; [¶] AND [¶] 4. When the defendant got the property, he intended to deprive the owner of it permanently.”

The theft by embezzlement instruction provided to the trial jury stated: “The defendant is charged in Counts 3, 6, and 9 with Grand Theft by embezzlement. To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. An owner or the owner’s agent entrusted his property to the defendant; [¶] 2. The owner or owner’s agent did so because he trusted the defendant; [¶] 3. The defendant converted or

theory as presented to the jury represents an unauthorized and unconstitutional amendment of the grand jury indictment.

“In charging theft [in an indictment] it shall be sufficient to allege that the defendant unlawfully took the labor or property of another.” (§ 952.) The relevant counts in the indictment presented by the grand jury allege defendants did (or did attempt to) “willfully and unlawfully take money and personal property of a value exceeding Four Hundred Dollars (\$400.00), . . . the property of THE STATE OF CALIFORNIA, THE COUNTY OF RIVERSIDE, and RIVERSIDE COMMUNITY COLLEGE.” The three counts relate to three separate schemes: the agreement with PVCC to share a percentage of FTES funds arising from CHP Sacramento courses; the agreement to share FTES funds arising from cooperative work experience courses accredited by PVCC; and the agreement to accredit past CHP academy graduates through distance learning courses and share FTES funds from such courses.

“An indictment or accusation cannot be amended so as to change the offense charged.” (§ 1009; see Levenson, Cal. Criminal Proc. (2006), § 11.34, p. 513 [“An indictment or information may only be amended within the scope of the original charge, and cannot be amended so as to change the offense charged.”].) Defendant cites several cases in support of his argument that the instruction of the jury on different theories of theft constituted an amendment of the indictment. (See *Stirone v. United States* (1960) 361 U.S. 212, 217-218 [error to allow trial jury to consider wholly separate factual basis for interference with interstate commerce not charged by grand jury]; *U.S. v. Choy* (9th Cir. 2002) 309 F.3d 602, 607 [“two distinct sets of facts” used to support indictment and conviction of bribery, the latter comprised of giving money to a private individual rather than a government official to facilitate the bribery scheme]; *Owen v.*

used that property for his own benefit; [¶] AND [¶] 4. When the defendant converted the property, he intended to deprive the owner of it permanently.”

Superior Court (1976) 54 Cal.App.3d 928, 933-934 [disallowing amendment by district attorney to add 32 additional offenses to the three offenses charged in the indictment].)

Here, unlike the cases cited by defendant, the factual allegations that served as the basis for the three counts of theft in the indictment remained the same at trial. Moreover, the prosecutor did not attempt to amend the indictment to include additional counts of theft. Defendant's constitutional rights were not violated by the use of different theft jury instructions at trial than were used in obtaining the grand jury indictment. (Cf. *People v. Gordon* (1975) 47 Cal.App.3d 465, 476 [noting, in the context of an argument that an indictment should be quashed because of incomplete jury instructions provided to the grand jury, that the Penal Code "contain[s] no requirement that the [prosecutor] instruct the grand jury on the law in the same manner that a trial judge instructs a petit jury"].)

Review for Substantial Evidence

Defendant claims there is insufficient evidence to sustain any of his convictions. We review the entire record in the light most favorable to the prosecution, and decide whether there exists substantial evidence from which any rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 562, 576-577.)⁸ Where the evidence of guilt is primarily circumstantial, the standard of review is the same. (*People v. Holt* (1997) 15 Cal.4th 619, 668.)

First, as to counts 1, 4, and 7, defendant was charged with violating Government Code section 1090, which states in relevant part: "[S]tate, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they

⁸ Furthermore, as conceded by defendant, "[m]ost of the facts in this matter are not substantially in dispute. Rather, it is the interpretation of those facts and their application to the pertinent statutory law that is at the heart of this Appeal."

are members.” Defendant contends the alleged conflicts of interest relate to contracts between PVCC and ILS, and therefore were not made by defendant in his “official capacity.” In other words, defendant does not dispute his status as a public employee, his financial interest in ILS and RTC, or the contracts leading to payments and contemplated payments by PVCC to ILS and RTC. Rather, defendant claims the arrangements alleged and proven do not satisfy the statute because his conduct was wholly separate from his official duties at RCC.

“Section 1090 is a general prohibition against an officeholder’s financial interest in a contract. Section 1090 prohibits any public officers or employers from having any financial interest, direct or indirect, in any contract made by them in their official capacity” (*Chapman v. Superior Court* (2005) 130 Cal.App.4th 261, 274.) “The duties of public office demand the absolute loyalty and undivided, uncompromised allegiance of the individual that holds the office. [Citations.] Yet it is recognized “that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.” [Citations.] Consequently, our conflict-of-interest statutes are concerned with what might have happened rather than merely what actually happened. [Citation.] They are aimed at eliminating temptation, avoiding the appearance of impropriety, and assuring the government of the officer’s undivided and uncompromised allegiance. [Citation.] Their objective ‘is to remove or limit the *possibility* of any personal influence, either directly or indirectly which might bear on an official’s decision. . . .” (*People v. Honig* (1996) 48 Cal.App.4th 289, 314, fn. omitted.)

In light of the broad language and purpose of the statute, we reject defendant’s argument. “It is not the type, size or source of interest that a public official obtains or is promised that matters when applying section 1090. Rather, it is the potential impact of that interest on a public official’s integrity that demands attention.” (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1333.) Defendant

utilized his official position at RCC to obtain financial opportunities for himself through contracts negotiated with a fellow institution, PVCC. It is true this is not a prototypical example of section 1090 jurisprudence — cases usually involve contracts between a private party in which the official has an interest and the public agency for which the official works. But the facts presented in this case are analogous to another common type of conflict of interest, usurpation of opportunity. Defendant, in conducting RCC’s affairs, inserted his own financial self-interest into the equation by creating personally lucrative contracts with PVCC. Regardless of whether RCC could have actually taken advantage of the opportunities developed by defendant, defendant’s private contracts with PVCC created a personal financial interest within the scope of his duties — managing the relationship between RCC and PVCC. Defendant’s private financial interest (maximizing profits to ILS) conflicted with his public duties (maximizing funding to RCC and maximizing educational opportunities in the community he served).

Next, defendant claims there was insufficient evidence to convict him of section 424, subdivision (a)(1), misappropriation of public funds. However, defendant’s argument is dependent on the claim discussed above with regard to jury instructions, i.e., only a misappropriation of funds specifically entrusted to defendant prior to the misappropriation can qualify as a violation of this section of the Penal Code. We reject the claim that section 424, subdivision (a)(1), requires a finding defendant misappropriated funds specifically entrusted to him. As discussed above, substantial evidence in the record supports the conclusion that defendant misappropriated public moneys intended for the use of community colleges in educating students.

Finally, defendant asserts there was insufficient evidence of “specific intent” with regard to five of the convictions: the two grand theft convictions, the attempted grand theft conviction, the attempted misappropriation of public funds conviction, and the conspiracy conviction. “[I]t is a valid defense to a charge of theft that the accused honestly believed that he had the right to take the subject property even if

such belief was based on a misconception of the law.” (*People v. Vineberg* (1981) 125 Cal.App.3d 127, 137.) To the extent this argument simply reiterates defendant’s claim that the jury improperly deliberated with regard to intent, we reject defendant’s argument. Furthermore, there is substantial evidence demonstrating defendant specifically intended to deprive the state and its community colleges of public funds that should have been available for the use of such community colleges in providing legitimate educational programs to students. Defendant misled his negotiating partners at PVCC and CHP, created false and misleading paperwork, and failed to inform his supervisors of his personal financial stake in brokering FTES to PVCC. Inferences of guilty intent are further supported by defendant’s agreement with Bailey and Curtin to not discuss their personal involvement with ILS and RTC. Substantial evidence supports the jury’s findings of defendant’s specific intent to commit the alleged offenses.

Defendant also points to the court’s comments at sentencing as a reason his convictions should be reversed: “The Court intends to grant probation under the terms and conditions recommended by probation. . . . [M]y view, I think, differs from the deputy district attorney’s view. I think this is a factually unusual case. [¶] A PVCC administrator, Al Stremble, suggested to the defendant that he could provide a service to allow PVCC to increase its enrollment and its FTESs. The defendant failed to do the necessary research and due diligence. However, the evidence indicated that almost everything that was done was out in the open. There were some slip-ups with the use of names, the signing of names, but the defendant I think was in the open. In fact, he did file his Form 700, which would give people notice of his business. I don’t know who looks at them, but it was filed, so there wasn’t any intent at least at that point to deceive.” The court’s comments reflect its view, after considering all of the evidence submitted at trial, that defendant did not deserve a harsh sentence because he was ignorant of the illegality of some of his actions and did not take measures to actively hide his involvement in ILS; the comments do not suggest a lack of substantial evidence

supporting the jury's determination defendant had the requisite mental state for his criminal convictions.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.